

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Larry G. Philpot,

Plaintiff

v.

Citizen Outreach Foundation, Inc.,

Defendant

Case No.: 2:20-cv-00824-JAD-EJY

**Order Denying Defendant's Motion to
Dismiss**

[ECF No. 8]

After taking a photograph of Ted Nugent at a concert, plaintiff Larry Philpot copyrighted his work and uploaded it to Wikimedia's website under a creative-commons license, permitting others to distribute, display, and use his photograph so long as they attributed it to him.¹ But defendant Citizen Outreach Foundation, Inc. used Philpot's photograph, without attribution, in an online article discussing celebrities who supported then-President Donald Trump.² So Philpot sues Citizen Outreach for copyright infringement under the Copyright Act.³ Citizen Outreach now seeks to dismiss Philpot's suit, arguing that its publication of the photograph falls within the fair-use doctrine's protective ambit.⁴ Because the undisputed facts and pleadings do not support Citizen Outreach's affirmative defense, I deny its motion to dismiss.

Discussion

Under 17 U.S.C. § 107, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." This affirmative defense presents "a mixed question of law and

¹ ECF No. 1 at ¶¶ 9, 23–28 (complaint).

² *Id.* at ¶¶ 30–31; 1-6 at 2.

³ *See generally* ECF No. 1.

⁴ ECF No. 8 (motion to dismiss).

fact” that presumes “that unauthorized copying has occurred” and addresses whether that copying “was fair.”⁵ The Copyright Act directs courts to consider four non-exclusive factors in assessing fair use: (1) the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;” (2) the “nature of the copyrighted work;” (3) the “amount and substantiality of the portion used in relation to the copyrighted work as a whole;” and (4) the “effect of the use upon the potential market for or value of the copyrighted work.”⁶ While courts can (albeit rarely) consider this affirmative defense on a motion to dismiss, the defendant bears the burden of demonstrating, based on undisputed facts, that its use of the copyrighted material fell within the fair-use doctrine’s protection.⁷

Citizen Outreach has failed to meet its burden of demonstrating fair use of Philpot’s photograph. There’s little doubt that the photograph merits robust copyright protection because it is a “creative, aesthetic expression of a scene or image” and not merely a “factual” depiction of an event.⁸ And while “news reporting is an example of fair use, it is not sufficient itself to sustain a per se finding of fair use.”⁹ Instead, defendants must generally show that they have transformed the copyrighted work, “add[ing] something new, with a further purpose or different

⁵ *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012) (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

⁶ 17 U.S.C. § 107; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–77 (1994).

⁷ *Cf.*, *Fisher v. Dees*, 794 F.2d 432, 435–36 (9th Cir. 1986) (finding fair use where the operative facts were undisputed or assumed; the court is to make fair-use judgments, which “are legal in nature”); *Monge*, 688 F.3d at 1170 (“As with all affirmative defenses . . . the defendant bears the burden of proof.”); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997) (noting the difficulty of assessing a fair-use defense where defendants cannot submit evidence on important parts of the claim).

⁸ *Monge*, 688 F.3d at 1177. Philpot alleges that he made several creative choices in taking this photograph, which I take as true at this stage of the litigation. See ECF No. 1 at ¶ 14.

⁹ *Monge*, 688 F.3d at 1173.

1 character, altering the first with new expression, meaning[,] or message.”¹⁰ Although Citizen
 2 Outreach defends its website’s purpose, it fails entirely to demonstrate how its use of Philpot’s
 3 exact photo, without alteration or addition, “serves a different function than the original work.”¹¹
 4 And courts have consistently held that news reporting must be about the work in question, as
 5 opposed to the subject of the work, to constitute fair use.¹² Finally, Citizen Outreach only offers
 6 factual disputes and hypotheticals to assert that its use of the photograph was not for commercial
 7 purposes and had no effect on the marketability of the photograph—arguments that are plainly
 8 belied by the documents attached to the complaint,¹³ which indicate that Citizen Outreach may
 9 have received advertising revenue from the publication.¹⁴ These facts, taken as true, thus cannot
 10 support Citizen Outreach’s affirmative defense.

11 Citizen Outreach’s claim that it made a good-faith mistake, and its reliance on inapposite
 12 and out-of-circuit precedent, does not alter my conclusion. “[T]he innocent intent of the
 13 defendant constitutes no defense to liability” under the Copyright Act.¹⁵ And the Fourth
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15 ¹⁰ *Campbell*, 510 U.S. at 579.

16 ¹¹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

17 ¹² *Cf.*, *Harper & Row, Publishers, Inc.*, 471 U.S. 539 at 557 (“The promise of copyright would
 18 be an empty one if it could be avoided merely by dubbing the infringement a fair use ‘news
 report’ of the book.”); *Monge*, 688 F.3d at 1176 (“Maya’s use—wholesale copying sprinkled
 with written commentary—was at best minimally transformative.”).

19 ¹³ *United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011) (noting that a court may
 20 “consider materials that are submitted with and attached to the complaint” when considering a Rule
 12(b)(6) motion).

21 ¹⁴ See ECF Nos. 10 at 9; 1-6; *Dr. Seuss Enters., L.P.*, 109 F.3d at 1403 (“Since fair use is an
 22 affirmative defense, [the defendants] must bring forward favorable evidence about relevant
 markets. Given their failure to submit evidence on this point . . . we conclude that ‘it is
 23 impossible to deal with the fourth factor except by recognizing that a silent record on an
 important factor bearing on fair use disentitle[s] the proponent of the defense.’” (citation
 omitted) (alteration in original)).

¹⁵ *Monge*, 688 F.3d at 1170.

1 Circuit's decision in *Brammer v. Violent Hues Productions, LLC*, cuts against Citizen Outreach's
2 argument: there, as here, the court held that the defendant's unauthorized use of a copyrighted
3 photo in a list of images of tourist attractions was not fair use.¹⁶ The Ninth Circuit's decision in
4 *Erickson Productions, Inc. v. Kast* is similarly unavailing because it dealt with vicarious liability
5 in a copyright-infringement case, assessing whether and how a third party might be liable for
6 another's copyright violations.¹⁷ That analysis is entirely irrelevant here. So I deny Citizen
7 Outreach's motion to dismiss.

8 **Conclusion**

9 IT IS THEREFORE ORDERED that defendant Citizen Outreach's motion to dismiss
10 [ECF No. 8] is **DENIED**.

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12 U.S. District Judge Jennifer A. Dorsey
13 Dated: March 3, 2021
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23 ¹⁶ *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263–65 (4th Cir. 2019).

¹⁷ *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 830 (9th Cir. 2019).